

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

---

STATE OF OKLAHOMA	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF-PJC
	)	
TYSON FOODS, INC., et al.	)	
	)	
Defendants.	)	
	)	

---

**TYSON DEFENDANTS’ MOTION IN LIMINE TO PRECLUDE  
DEPOSITION TESTIMONY OF PRESTON KELLER**

Come now Defendants Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Poultry, Inc., and Cobb-Vantress, Inc. (collectively “Tyson Defendants”), and hereby move the Court to preclude the use of Preston Keller’s deposition testimony pursuant to Federal Rules of Evidence 702, 801, and Federal Rule of Civil Procedure 32. In support thereof, the Tyson Defendants state as follows:

1. The Tyson Defendants seek to limit the use of the deposition testimony of Tyson’s *former* employee, Preston Keller. Mr. Keller held various positions during his career at Tyson, culminating in his role as Director of Environmental Agriculture prior to voluntarily resigning on July 31, 2005, to pursue other opportunities. Ex. 1, Deposition of Preston Keller, 23:4-21 (“Keller Depo.”). Plaintiffs have designated portions of Mr. Keller’s October 15, 2008 deposition, and the Tyson Defendants expect, based on questions asked at the deposition and Plaintiffs’ prior use of the testimony, that Plaintiffs will offer his testimony as judicial admissions of a party-opponent or for related, and equally impermissible, purposes.

2. The Tyson Defendants did not designate Mr. Keller as a corporate representative under Federal Rule of Civil Procedure 30(b)(6), and he was not otherwise authorized to speak for and on their behalf. Instead, the Tyson Defendants identified and Plaintiffs deposed seven (7) Rule 30(b)(6) representatives who were authorized to speak for and on behalf of the Tyson Defendants. Plaintiffs also noticed and had the opportunity to depose Kevin Igli, a current Senior Vice President and Tyson's Senior Environmental Health and Safety Officer. The testimony from these *current* employees covers the same topics discussed in Mr. Keller's deposition. As such, the deposition of Mr. Keller, a former employee, should not and cannot be used at trial as an admission by party-opponent.

3. The rules governing the use of deposition testimony from former employees and the limitations thereon are described in Federal Rule of Civil Procedure 32 and Federal Rule of Evidence 801(a)(2)(D). Foremost, Plaintiffs bear the burden of establishing the admissibility of the deposition they have designated. *See Garcia-Martinez v. City of Denver*, 392 F.3d 1187, 1191 (10th Cir. 2004). Plaintiffs' burden of establishing the admissibility of deposition testimony comprises a two-step analysis. *See* 8A WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE & PROCEDURE § 2142, at 159. "First, the condition set forth in Rule 32(a) must exist before the deposition can be used at all. Second, when it is found that these conditions authorize the use of the deposition, it must be determined whether the matters contained in it are admissible under the rules of evidence." *Id.*

4. Specifically, with regard to the first portion of the analysis, Federal Rule of Civil Procedure 32(a)(3) provides that "[a]n adverse party may use for any purpose the deposition of a party or anyone who, *when deposed*, was the party's officer, director, managing agent, or

designee under Rule 30(b)(6) or 31(a)(4).” Fed. R. Civ. P. 32(a)(3) (emphasis added).<sup>1</sup> As previously noted, Mr. Keller was not employed by the Tyson Defendants at the time of his deposition, making his deposition testimony inadmissible under the initial portion of this analysis.

5. Even were Plaintiffs able to satisfy their initial burden, they still cannot satisfy the second prong of the analysis. The admission-by-party-opponent provision in Federal Rule of Evidence 801(a)(2)(D) is narrowly defined and does not include the statements of former employees. Like Federal Rule of Civil Procedure 32(a)(3), the party-opponent provision has a temporal element that is not met by the deposition transcripts at issue. In this regard, admissions by party-opponents are limited to a statement offered against a party, which is “a statement made by the party’s agent or servant concerning a matter within the scope of the agency or employment, *made during the existence of the relationship.*” Fed. R. Evid. 801(d)(2)(D) (emphasis added). Accordingly, the designated portions of Mr. Keller’s deposition cannot be offered as an admission by the Tyson Defendants.

6. If, however, the Court allows Plaintiffs to use Mr. Keller’s deposition transcript at trial, the Tyson Defendants further move the Court to exclude any and all testimony from the transcript containing expert opinions. On several occasions during Mr. Keller’s deposition, Plaintiffs attempted to solicit impermissible expert testimony. For example:

Q Okay, and when you say that, does that mean that if you land applied poultry waste which contains phosphorus -- let me ask it this way: You know poultry waste contains phosphorus, do you not?

A Yes.

---

<sup>1</sup> To the extent that Plaintiffs contend the deposition testimony satisfies one or more of the other categories in Rule 32(a), they nonetheless have the burden of demonstrating admissibility of the deposition testimony.

Q All right, and when you land apply poultry waste, if there is a heavy rain, there's a propensity for runoff; correct?

MR. BOND: Object to the form.

A If you apply it too close to the rain, you bet.

Ex. 1, Keller Depo, 100:19-101:4. Mr. Keller was never disclosed as a nonretained expert as required by Federal Rule of Civil Procedure 26. *See* Fed. R. Civ. P. 26(a)(2); *Aumand v. Dartmouth Hitchcock Med. Ctr.*, 611 F. Supp. 2d 78, 88 (D.N.H. 2009) (listing authorities requiring disclosure of nonretained experts). Moreover, Plaintiffs made no effort during Mr. Keller's deposition to qualify him as an expert on any topic pertinent to this lawsuit. Even had such an attempt been made, Plaintiffs bear the burden of proving that a nonretained expert is qualified to give expert opinions on the matters upon which he has been asked to opine. *See Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970 n.4 (10th Cir. 2001). Plaintiffs have failed to meet this burden, and Mr. Keller's opinions on the various environmental, agricultural, and industry topics involved in this lawsuit do not satisfy the requirements for admissibility under, among others, Federal Rule of Evidence 702. As such, Plaintiffs should be prohibited from offering any of the testimony from Mr. Keller's deposition which amounts to an expert opinion on any topic pertinent to this lawsuit.

WEREFORE, Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Poultry, Inc., and Cobb-Vantress, Inc. move the Court for precautionary instructions preventing Plaintiffs, their counsel, experts retained by Plaintiffs, and other witnesses offered by Plaintiffs from quoting, making reference to, or otherwise attempting to offer any designated portion of Mr. Keller's deposition testimony as an admission by Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Poultry, Inc., or Cobb-Vantress, Inc. and further requests that Plaintiffs be precluded from offering Mr. Keller's testimony as an expert opinion on any issue before the Court.

Respectfully submitted,

BY: /s/ Michael R. Bond

Michael R. Bond, *appearing pro hac vice*  
Erin Thompson, *appearing pro hac vice*  
Dustin R. Darst, *appearing pro hac vice*  
KUTAK ROCK LLP  
234 East Millsap Road, Suite 400  
Fayetteville, Arkansas 72703-4099  
(479) 973-4200 Telephone  
(479) 973-0007 Facsimile

-and-

Robert W. George, OBA #18562  
Bryan Burns, *appearing pro hac vice*  
TYSON FOODS, INC.  
2210 West Oaklawn Drive  
Springdale, Arkansas 72762  
(479) 290-4067 Telephone  
(479) 290-7967 Facsimile

-and-

Patrick M. Ryan, OBA # 7864  
Stephen L. Jantzen, OBA # 16247  
Paula M. Buchwald, OBA # 20464  
RYAN, WHALEY & COLDIRON, P.C.  
119 North Robinson, Suite 900  
Oklahoma City, Oklahoma 73102  
(405) 239-6040 Telephone  
(405) 239-6766 Facsimile

-and-

Jay T. Jorgensen, *appearing pro hac vice*  
Thomas C. Green, *appearing pro hac vice*  
Mark D. Hopson, *appearing pro hac vice*  
Gordon Todd, *appearing pro hac vice*  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005-1401  
(202) 736-8000 Telephone  
(202) 736-8711 Facsimile

Attorneys for Defendants Tyson Foods,  
Inc., Tyson Chicken, Inc., Tyson Poultry,  
Inc., and Cobb-Vantress, Inc..

## **CERTIFICATE OF SERVICE**

I certify that on the 5th day of August, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General  
Kelly Hunter Burch, Assistant Attorney General

drew\_edmondson@oag.state.ok.us  
kelly\_burch@oag.state.ok.us

Douglas Allen Wilson  
Melvin David Riggs  
Richard T. Garren  
Sharon K. Weaver  
Robert Allen Nance  
Dorothy Sharon Gentry  
Joseph P. Lennart  
David P. Page  
RIGGS ABNEY NEAL TURPEN ORBISON & LEWIS

doug\_wilson@riggsabney.com  
driggs@riggsabney.com  
rgarren@riggsabney.com  
sweaver@riggsabney.com  
rnance@riggsabney.com  
sgentry@riggsabney.com  
jlennart@riggsabney.com  
dpage@riggsabney.com

Louis W. Bullock  
Robert M. Blakemore  
BULLOCK BULLOCK & BLAKEMORE, PLLC

lbullock@bullock-blakemore.com  
bblakemore@bullock-blakemore.com

Frederick C. Baker  
William H. Narwold  
Elizabeth C. Ward  
Elizabeth Claire Xidis  
Ingrid L. Moll  
Jonathan D. Orent  
Michael G. Rousseau  
Fidelma L. Fitzpatrick  
MOTLEY RICE, LLC

fbaker@motleyrice.com  
bnarwold@motleyrice.com  
lward@motleyrice.com  
cxidis@motleyrice.com  
imoll@motleyrice.com  
jorent@motleyrice.com  
mrousseau@motleyrice.com  
ffitzpatrick@motleyrice.com

### **COUNSEL FOR PLAINTIFFS**

A. Scott McDaniel  
Nicole Longwell  
Philip D. Hixon  
Craig A. Mirkes  
MCDANIEL HIXON LONGWELL & ACORD, PLLC

smcdaniel@mhla-law.com  
nlongwell@mhla-law.com  
phixon@mhla-law.com  
cmirkes@mhla-law.com

Sherry P. Bartley  
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC  
**COUNSEL FOR PETERSON FARMS, INC.**

sbartley@mwsgw.com

Robert P. Redemann  
David C. Senger  
PERRINE, MCGIVERN, REDEMANN, REID, BERRY & TAYLOR, PLLC

rredemann@pmrlaw.net  
dsenger@pmrlaw.net

Robert E. Sanders  
E. Stephen Williams  
YOUNG WILLIAMS P.A.

rsanders@youngwilliams.com  
steve.williams@youngwilliams.com

**COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.**

George W. Owens  
Randall E. Rose  
THE OWENS LAW FIRM, P.C.

gwo@owenslawfirmmpc.com  
rer@owenslawfirmmpc.com

James M. Graves  
Gary V. Weeks  
Woody Bassett  
K.C. Dupps Tucker  
Earl Lee "Buddy" Chadick  
Vince Chadick  
BASSETT LAW FIRM

jgraves@bassettlawfirm.com  
gweeks@bassettlawfirm.com  
wbassett@bassettlawfirm.com  
kctucker@bassettlawfirm.com  
bchadick@bassettlawfirm.com  
vchadick@bassettlawfirm.com

**COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.**

John R. Elrod  
Vicki Bronson  
Bruce W. Freeman  
D. Richard Funk  
P. Joshua Wisley  
CONNER & WINTERS, PLLC

jelrod@cwlaw.com  
vbronson@cwlaw.com  
bfreeman@cwlaw.com  
dfunk@cwlaw.com  
jwisley@cwlaw.com

**COUNSEL FOR SIMMONS FOODS, INC.**

John H. Tucker  
Colin H. Tucker  
Theresa Noble Hill  
Kerry R. Lewis  
Colin C. Deihl  
RHODES, HIERONYMUS, JONES, TUCKER & GABLE

jtucker@rhodesokla.com  
chtucker@rhodesokla.com  
thill@rhodesokla.com  
klewiscourts@rhodesokla.com

Terry W. West  
THE WEST LAW FIRM

terry@thewestlawfirm.com

Delmar R. Ehrich  
Bruce Jones  
Krisann C. Kleibacker Lee  
Todd P. Walker  
Melissa C. Collins  
FAEGRE & BENSON LLP  
Dara D. Mann

dehrich@faegre.com  
bjones@faegre.com  
kklee@faegre.com  
twalker@faegre.com  
mcollins@faegre.com

MCKENNA, LONG & ADLRIDGE, LLP

dmann@mckennalong.com

**COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC**

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

J.D. Strong  
Secretary of the Environment  
State of Oklahoma  
3800 North Classen  
Oklahoma City, OK 73118

/s/ Michael R. Bond

Michael R. Bond